FEB 12 1979

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-6673

ZACKARY C. BROWN,

Appellant,

v.

STATE OF TEXAS

Appeal from the County Court at Law Number Two
El Paso County, Texas

APPELLANT'S REPLY BRIEF

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Appellant Zachary Brown submits the following brief in reply to Appellee's brief:

I.
First Amendment Questions

A. The State argues that "Section 38.02(a) does not implicate any First Amendment freedom of expression issues."

Contrary to the position of the State here, refusal to reveal one's identity can be protected activity under the First Amendment. For example, there could be a meeting of a controversial or unpopular or oppressed group, or it could be a civil rights organization, a group of masked Iranian marchers, a gay rights organization, or an anti-war protest. Suppose that the authorities want to find out the membership of the organizations and the identities of participants at meetings, marches, rallies, and other assemblies. Since they cannot by court action or statute compel the disclosure of membership lists, N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958), may the State accomplish the same end simply by stopping each marcher or member and forcing that person to reveal his or her identity? The answer should be that the State may not. In N.A.A.C.P. v. Alabama, supra, this Court stated:

> This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

357 U.S. at 462.

So privacy of association has long been recognized as protected by the First Amendment. The right of privacy of association would be meaningless if one can be forced to reveal his identity. What would stop the police from entering an assembly and forcing each and every participant to reveal his or her identity?

It could be that a group does not want its membership known, and it could also be that an individual does not want his interest or affiliation with a group to be known. The examples are too numerous to cite, but they could include the worker who is interested in union membership but does not want his employers to know. Close affiliation by law enforcement with some companies, particularly in some small communities, is not uncommon. It could be the reverse; the case of the worker who wishes to decertify a union as a bargaining agent or to change to another union. It could be the case of the Iranian student who wears a mask to hide his identity because of fear of reprisal if it becomes known that he is protesting against a particular government. Recently, a

California statute making criminal the wearing of masks in public was held void and unconstitutional. Ghafir v. Municipal Court for City and County of San Francisco, 150 Cal.Reptr. 813 (Cal.Ct.App., 3rd Div. 1978). Or it could be the case of a person who protests, alone or with others, the violation of human rights in Communist countries but does not want his or her identity known because of possible reprisals against friends or relatives in the old country.

So silence is part of one's right to freedom of expression and association under certain circumstances.

B. The State contends that "on balance, the significant state interests furthered by Section 38.02(a) override any interests in freedom of expression it might affect."

In this part of the argument the State listed one, and only one, interest and expressed it as follows:

> In the instant case, the balance tilts decidedly in favor of the state's interest in protecting its citizens from criminal incursions upon their persons and property. Section 38.02(a) is an attempt by the state to allow its law enforcement officers to undertake at least a rudimentary investigation in circumstances creating a reasonable suspicion that a crime is being, has just been, or is about to be committed, but falling short of creating probable cause for an arrest.

(Appellee's brief, p. 11)

The State has apparently missed the entire point of a section of Appellant's brief. One of the problems with Section 38.02(a) is that it is not restricted to instances of criminal conduct or even suspected criminal conduct. Appellant previously pointed out that Article 2.24 of the Texas Code of Criminal Procedure, repealed and replaced by Section 38.02(a), did require identification by witnesses to crimes. The State did not even mention old Article 2.24, or the fact

that Section 38.02(a) is applicable whether or not a crime is committed or even suspicioned.

If the only interest asserted by a state is one to prevent crime, then there is no state interest sufficient to overcome one's right to remain silent and refuse to identify oneself. The conduct which Appellant asserts is protected by the First Amendment does not involve criminal acts, but merely the types of activities long sanctioned by this Court, such as speaking, marching, or attending private meetings, or attending public meetings anonymously.

Not only has the State not demonstrated a compelling interest as is required when First Amendment rights are to be subordinated, Sweezy v. New Hampshire, 354 U.S. 234 (1957); and N.A.A.C.P. v. Alabama, supra, it has not shown an applicable interest at all.

II.
Fourteenth Amendment Questions

A. Section 38.02(a) is vague on its face and does not meet due process certainty in drafting requirements.

In cases involving First Amendment protected rights, this Court's standards for vagueness are more strict than in other cases. N.A.A.C.P. v. Button, 371 U.S. 415 (1963). It has previously been shown that the language used by Section 38.02(a) is not subject to precise construction. Some law officers have construed the "identification" requirement to include something beyond an oral identification and might include specified types of identification. Heath, Thomas and Washington v. A. J. Brown, et al., CA-4-77-204 (N.D. Tex.), jurisdictional statement pending; and Michigan v. DeFillippo, No. 77-1680 (U. S. Supreme Court).

B. Section 38.02(a) is unconstitutionally overbroad because it makes criminal conduct protected by the Constitution.

More than being void for vagueness, this statute is unconstitutional because it is impermissibly broad and allows the State to punish one for conduct protected by the Constitution. It is not necessary that Appellant have engaged in protected conduct himself in order to benefit from this argument. This Court has stated as follows in N.A.A.C.P. v. Button, supra:

> [A statute] may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment rights need breathing space to survive, government may regulate in the area only with narrow specificity.

371 U.S. at 432, 433.

For those reasons stated before and below, Section 38.02(a) does make criminal protected activity and is, therefore, unconstitutional.

III.
Fourth Amendment Questions

A. The state contends that Appellant "is foreclosed from raising the Fourth Amendment issue in this Court."

The State argues that Fourth Amendment violations may be raised only by filing a motion to suppress evidence. There

was no tangible evidence to present here. The only evidence was negative--that is, that Appellant did not identify himself.

Appellant attacked Section 38.02(a) on its face and not as it was applied in this specific case. Having done that, certainly Appellant is in a position to argue that the statute is vague and overbroad because it punishes conduct or activity which is protected by the Fourth as well as other amendments. The State cites this Court cases on standing, claiming that Appellant has no standing to complain of Fourth Amendment violations on others. The State totally misses the point here.

In an examination of a statute for vagueness and overbreadth, one must look to see if conduct protected by the Constitution is punished. Certainly, since Appellant has attacked the statute on its face, he can point to its actual as well as its potential application.

B. Section 38.02(a) is unconstitutional as making lawful unwarranted invasions of rights protected by the Fourth Amendment.

Here again, the State speaks of the "search" in this case being reasonable. There was no search in this case, and Appellant goes beyond the facts of this case to attack the statute on its face.

Although no appellate court has previously reviewed Section 38.02(a), the Texas Court of Criminal Appeals, sitting en banc, has recently spoken on those same issues involved in this case. In Ceniceros v. State, 551 S.W.2d 50 (Tex.Ct.Crim. App. 1977), that Court stated as follows:

> I can see how some would view the request for identification as a relatively minor intrusion into the personal freedom of an individual. However, I cannot accept the reasoning that the individual can remedy an unjustified request by simply denying the request and walking away. See, Nicholas,

supra, at 624. To so hold would be to belie the fact that most ordinary citizens feel they must act with respect for the color of the law. Unjustified requests for individuals to produce their identification should not take place.

Because there was no shred of justification for the arresting officer's demand that the appellant produce his identification, I would hold that this action was unreasonable within the meaning of the Fourth Amendment to the United States Constitution and Article I, Section 9 of the Constitution of this State. [Panel dissenting opinion which was adopted by the majority en banc.]

* * *

> The officer here, acting under his badge of authority, approached the appellant and his companions specifically for investigative purposes to secure information and 'to see if they had any business in the area.' Such investigations should be initiated only if the officer can give 'specific reasonable inferences which he is entitled to draw from the facts in light of his experience,' Terry v. Ohio. . . . It appears the officer initiated his investigation on 'his inchoate and unparticularized suspicion' (Terry v. Ohio, supra) that appellant and his companions might in some way be connected with the recent burglaries. If such a suspicion were a reasonable inference from standing on a street corner in this neighborhood, all citizens passing through victimized neighborhoods would be suspects, and pedestrian checkpoints could be set up to monitor their comings and goings. Practices of this kind are repugnant to a free society. If victimization by crime becomes the justification for indiscriminate intrusion by the state, then we forfeit the security of our persons and privacy from invasion by the police on a hope of future security from the criminal, and ultimately find ourselves the displaced refugees in a raging war on crime.

So, at least in Texas, asking for a person's identity when there is no particular need to do so does violate the Fourth Amendment, contrary to what Appellee contends.

Because one may reveal his or her name on some occasions does not mean that a policeman has the right to force a person to reveal his or her name under any circumstances. The right of privacy already discussed and the right to keep one's

associations private and confidential should be paramount and should remain intact.

Conclusion

For all the foregoing reasons, as well as for those previously set out in the opening brief, Appellant urges this Court to reverse his conviction and declare Section 38.02(a) of the Texas Penal Code unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 1979, true copies of Appellant's Reply Brief were mailed to: Renea Hicks, Assistant Attorney General, P. O. Box 12548, Austin, Texas, 78711; and Karl Phaler, Deputy Attorney General, 110 West A Street, Suite 600, San Diego, California, 92101.

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